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TABLE OF CASES

In the Supreme Court of the United States

OCTOBER TERM, 1924

CAIRO, TRUMAN & SOUTHERN RAILROAD Company, appellant

v.

THE UNITED STATES OF AMERICA AND James C. Davis, Director General of Railroads, appellees

No. 230

APPEAL FROM THE COURT OF CLAIMS

BRIEF ON BEHALF OF APPELLEES

STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Claims, sustaining a demurrer to appellant's amended petition in a suit brought to recover for losses alleged to have been sustained by the appellant during the first six months of the year 1918, during which time it claims its railroad was in the possession of and being operated by the Government under Federal control. The plaintiff filed its original petition on October 11, 1922. A demurrer thereto was sustained on April 22, 1923.

Neither the original petition nor demurrer had been made a part of the record. (Record, page 1.)

The order sustaining the demurrer and memorandum setting forth the conclusions of the Court of Claims are set out on page 1 of the Record, and same show the demurrer was sustained generally on the grounds that petition failed to show jurisdiction in the Court and that assuming the Court to have jurisdiction, an agreement described as Exhibit A, attached to the petition, "concludes any rights the plaintiff might otherwise have." Amended petition was filed June 7, 1923, by leave of Court and is set forth on pages 2 to 6 of the record. The amended petition alleges that the appellant is a corporation organized under the laws of the State of Arkansas and for a long time has been engaged in business as a common carrier of freight and passengers for hire in said State and in interstate commerce, with its principal office in the city of St. Louis, and during the first six months of 1918 its railroad connected with the rails of the St. Louis-San Francisco Railway Company, then under Federal control; that James C. Davis is the duly appointed, qualified, and acting Director General of Railroads and as such is made a party defendant; that pursuant to authority of Congress appellant's railroad was taken into the possession of the Government under proclamation of the President dated December 26, 1917, and that the Government pursuant thereto operated said railroad and continued in possession thereof there-

after until June 29, 1918, upon which date notice of relinquishment by the Government was given to the appellant, and on July 1, 1918, it resumed possession and operation of its railroad.

The amended petition further alleges that the appellees became liable for the operation and control of said railroad and for the cost and maintenance of said operation and control from January 1st to July 1st, 1918, under the provisions of the Federal Control Act; that the appellant and the President were unable to agree upon the compensation to be paid the appellant for the use of its property and that no agreement has been made covering same; and that the Director General has refused to acknowledge and has denied liability in the premises and has refused to pay the cost and expense of operation during the period January 1 to July 1, 1918. Paragraph 4 of the amended petition is as follows:

> That pretending to act under and by virtue of the proclamation so issued by the President, and by virtue of the provisions of the Federal Control Act, and by virtue of his own authority, more completely to control the business theretofore conducted by said plaintiff, and more completely to control and direct the business of this plaintiff, and to transfer the same to other lines of railroad then under his control and operation, the Director General, by virtue of his power and influence over the business of the plaintiff operated in connection with lines

of railroad then in his operation and control, advised and in effect forced and compelled this plaintiff to accept and sign a contract, then known as a per diem contract for short line railroads, under date of September 10, 1919, a full, true, and correct copy of which contract is hereto attached, marked Exhibit A, and made a part hereof.

That said contract was arranged, drawn, and constructed entirely by the Director General, and contained such provisions as he demanded, and did not express a fair and equal agreement on the part of this plaintiff. That the same was not signed by the Director (fol. 6) General, or by anyone for him, but was accepted by the officers of the plaintiff for the purpose of saving for themselves such rights, privileges, and conveniences as were indicated by the Director General, and was signed for this purpose only, and not otherwise, and for the supposed concessions set out in the contract itself.

That said contract was entirely unilateral, and was without any consideration whatever, granted by the Director General to and for the use of the plaintiff, and that all the pretended rights, privileges, and conveniences supposed to be granted by the Director General to the plaintiff were then the rights, privileges, and conveniences of the plaintiff granted to it by law. That the plaintiff gained nothing by the execution and acceptance of this contract, and by it lost no rights whatsoever.

That the whole of said contract always was, and now is, wholly null and void, for the reason that the same was prepared and demanded by the Director General without any power or authority so to do, and is in direct violation of law then in full force and effect, and attempted to create a relation already created by law, and different than what was provided therein; that no consideration was created therein or intended to be created therein for the use and benefit of the plaintiff and that no reference was made in said contract or intended to be made in said contract to the right of this plaintiff to recover from the United States and the Director General its cost of operation during said six months from January 1 to July 1, 1918, when said plaintiff and its railroad were under the control and operation of the Director General, and to recover any and all depreciation in property because of said use and operations during said period, and to recover a just compensation for the use and operation of (fol. 7) said railroad and all of its equipment during said period as guaranteed to it by law.

That said contract was in nowise and to no extent a waiver of its rights to recover from the United States and the Director General its expenses of operation, its loss in depreciation, and its just compensation above mentioned, and in the signing of said contract by the officers of the plaintiff, no intent was recorded that they accepted the

terms of the contract as a waiver of said right in any way or to any extent whatsoever.

It is apparent from the contract that its provisions were prospective and applied solely from and after the date of relinquishment and were not to apply in anywise to the period of control from January 1 to July 1, 1918.

In paragraph 5 of said amended petition (Record, page 4) appellant alleges that during the six months in controversy, because of the control and operation of its properties and because of the control and diversion of its traffic and business by the Director General, appellant sustained a deficit in its operating income which the Director General has refused to pay appellant; that during said period because of Federal control and operation appellant sustained a further loss on account of under-maintenance of its equipment by reason of the failure of the Director General to adequately provide for repairs and renewals, which loss has not been repaid; that during said period appellant suffered a further loss by reason of failure of the Director General to adequately provide for maintenance of structures and right of way, in an amount stated, which has not been repaid; that during said period appellant suffered a further loss, in an amount stated, by reason of failure of the Director General to supply necessary materials used in the operation of the railroad, which amount appellant

alleges has not been repaid, and the President and the Director General, though often solicited, have failed and refused, and still refuse, to pay to appellant.

In paragraph 6 of said amended petition (Record, page 5) appellant alleges that it applied to the Interstate Commerce Commission for appointment of a Board of Referees to fix its compensation and to determine its loss, as provided by Section 3 of the Federal Control Act; that the Board of Referees was appointed; that its said claims were presented to said Board of Referees, and on June 14, 1923, said Board rejected all of appellant's claims.

Attached to said amended petition is Exhibit A, referred to in paragraph 4 thereof, same being a copy of a contract entered into by the Director General and the appellant on September 10, 1919, which recites in part:

> Whereas the said Railroad Company has elected not to enter into the standard cooperative short-line contract with the Director General of Railroads, but is desirous of obtaining the special advantages of two days' free time or reclaim allowance on cars, and such other cooperation as may be accorded to it by the Director General in pursuance of his general policy of cooperation toward short-line roads as announced by him;
>
> Now, therefore, the said Railroad Company, in consideration of the premises, and

> of obtaining the advantages of the two days' free time or reclaim allowance and such other cooperation as is accorded to it by the Director General of Railroads, hereby agrees to accept the same in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights, at law or in equity, which it now has, or hereafter can have, against the United States, the President, the Director General of Railroads, or any agent or agency thereof, by virtue of anything done or ommitted pursuant to the acts of Congress relating to the Federal control of Railroads: Provided, however, That nothing herein is intended to affect any claim said company may have against the United States for carrying the mails (fol. 11), or for other services rendered not pertaining to or based upon the Federal Control Act.
>
> (Record, pages 5 and 6.)

On June 26, 1923, the appellees demurred to said amended petition, the substance of said demurrer being first that the facts alleged did not constitute a cause of action within the jurisdiction of the Court of Claims, and second, that the facts alleged in the amended petition show a complete settlement and satisfaction of any and all claims plaintiff had or could have had, against the United States or the Director General of Railroads, under the Federal Control Act or on account of anything done or admitted to be done by the United States of America or the Director General of Railroads in respect to

the matters set forth in the amended petition, and that the facts alleged do not show the appellant is entitled to any relief as against the appellees, or either of them. (Record, page 6.)

On November 5, 1923, the demurrer was sustained generally and the petition dismissed. (Record, page 7.)

The sole question for consideration of this Court is whether the agreement made a part of the amended petition as Exhibit A, constitutes a full and complete settlement of the claims now presented by the appellant, and whether such agreement "concludes any rights the plaintiff might otherwise have."

ARGUMENT

I

The allegations of the amended petition show a full and complete settlement and satisfaction of all claims appellant had, or might have, against the United States, the President, or the Director General, on account of the alleged taking and using of its property by the Government during the time in controversy, and same including the claims now asserted

While there is grave doubt as to whether appellant's property was ever in the possession of, or operated by the United States within the meaning of the Federal Control Act, and whether appellant's property was taken by the Government in the sense of entitling appellant to compensation or damages, such matters are for the purposes of demurrer admitted. Assuming that appellant's

property was so taken and operated by the Government, it is conceded that the Government relinquished the property on June 29, 1918, as it had a right to do pursuant to the provisions of Section 14 of the Federal Control Act. All of the claims relate to the alleged taking, use, and operation between the dates January 1 and July 1, 1918. After appellant's property was relinquished by the Government, and on July 1, 1918, the appellant resumed the possession, use, and operation thereof, and continued therein during the balance of the Federal control period. On September 10, 1919, the agreement, made a part of amended petition as Exhibit " A," was executed and became effective. The language of such agreement is clear, definite, and comprehensive, and leaves in our judgment no room for construction, interpretation, or doubt. After reciting that the appellant had elected not to enter into the standard cooperative short-line contract tendered by the Director General, but that it

> is desirous of obtaining the *special advantages* of the two days' free time or reclaim allowance on cars, and such other cooperation as may be accorded to it by the Director General in pursuance of his general policy of cooperation toward short-line railroads."

The agreement provided:

> Now, therefore, the said railroad company in consideration of the premises, and of obtaining the advantages of the two days'

> free time or reclaim allowance and such other cooperation as is accorded to it by the Director General of Railroads, hereby agrees to accept the same in full adjustment, settlement, satisfaction and discharge of any and all claims and rights at law, or in equity, which it now has, or hereafter can have against the United States, the President, the Director General of Railroads, or any agent or agencies thereof *by virtue of anything done or omitted pursuant to the acts of Congress relating to the Federal control of railroads, or any act of the President, or of the Director General of Railroads*: Provided, however, *That nothing herein is intended to affect any claim said company may have against the United States in carrying the mail, or for other services rendered not pertaining to or based upon the Federal Control Act.*

Appellant now contends that this agreement was not intended to cover and include the claims now asserted, or any claims accruing during the period January 1, to July 1, 1918, on account of possession, use and operation of its property by the Government, but that same was intended to include matters arising or accruing after July 1, 1918. Appellant further claims that the agreement is not binding upon it because precured by coercion, because unilateral and without consideration, and because the Director General was without authority or power to make the contract. We will consider such contentions in the order suggested.

A

The agreement of September 10, 1919, included and was intended to include settlement and satisfaction of claims now asserted by appellant

It must be remembered that appellant resumed possession of its property on July 1, 1918, and that the agreement involved was not executed until September 10, 1919, more than fourteen months after relinquishment by the Government, during which period appellant was in sole possession, use, and operation of the property without any interference from the Government. It must also be remembered that the contract provides:

> The said railroad company in consideration of the premises and of obtaining the advantages of the two days' free time or reclaim allowance * * * hereby agrees to accept the same in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights at law, or in equity, which it now has, or hereafter can have, against the United States, the President, the Director General of Railroads, or any agent or agencies thereof *by virtue of any thing done or omitted, pursuant to the acts of Congress relating to the Federal control of railroads, or any act of the President or of the Director General of Railroads.*

This language is clear and comprehensive. It includes—

> any and all claims and rights at law, or in equity, which it *now has,* or hereafter can

> have, * * * by virtue of anything done or omitted, pursuant to the acts of Congress relating to Federal control of railroads, or any act of the President or the Director General of Railroads.

There is no suggestion in the amended petition that the appellant had any claims against the United States or the Director General other than those accuring during the first six months of 1918 on account of alleged Federal control of its property, with the exception of certain claims which it took the precaution to protect and reserve from the operation of the agreement. It will be recalled the agreement, after reciting the claims and rights which were adjusted, settled, satisfied and discharged, continued:

> Provided, however, that nothing herein is intended to affect any claim said company may have against the United States for carrying the mails or for other services rendered not pertaining to or based upon the Federal Control Act.

This provision conclusively indicates that the appellant was alert in reserving from the operation of the agreement claims which it had against the United States which it did not intend to satisfy, settle, or discharge. Being alert in protecting itself and in reserving from the operation of the agreement its claims for carrying mails, and " for other services rendered not pertaining to or based upon the Federal Control Act," it must, we think,

be assumed that appellant did not intend to reserve and withhold from the operation of the agreement its claims now asserted on account of the alleged Federal control and operation of its property. Appellant knew that the Government had been in the possession, use and operation of its property. It must have known the effect thereof upon its revenues, and it must have known whether there had been a failure to properly maintain the equipment, structures and roadbed, or to supply the necessary materials for maintenance of the property, for it had been in the possession, use and operation thereof more than fourteen months after relinquishment by the Government before entering into the agreement in controversy. Under the facts alleged in the amended petition appellant cannot be heard to say that it did not know of such claims, or that it did not know of its right to recover from the Government on account of such matters, or that such claims are not clearly and conclusively within the description of the claims it acknowledged "adjustment, settlement, satisfaction and discharge" in consideration of the Director General continuing to it the "special advantage" of the two days' free time or reclaim allowance on his cars furnished appellant for use in the operation of its railroad. Appellant does not suggest there were any other claims in existence or contemplation when the agreement was made, to which same could attach. In argument appellant suggests the claims referred to must have been claims accruing after

the relinquishment of the property to the appellant, but the language of the agreement describes the claims settled, adjusted, satisfied and discharged as being all claims appellant—

> now has or hereafter can have against the United States * * * by virtue of anything done or omitted pursuant to the acts of Congress relating to the Federal control of railroads, et cetera.

Are not the claims now asserted by virtue of something done pursuant to the acts of Congress relating to the Federal control of railroads? Is it not alleged that the possession, operation, and use of appellant's railroad by the Government was by virtue of the acts of Congress relating to Federal control of railroads? Was not the taking possession and the operation of the railroad something done pursuant to such acts of Congress? Was not the omission to properly maintain the property an omission pursuant to acts of Congress relating to Federal control of railroads? Was not the failure to pay compensation or damage resulting from the taking or to properly maintain the property an omission pursuant to acts of Congress relating to the Federal control of railroads? We think the claims now asserted could not have been more aptly described than by the language employed in the agreement in controversy. The claims that must have been uppermost in the minds of both the Director General and the appellant in making the agreement were the claims growing out of the

Federal control of appellant's property prior to the date of relinquishment, and the fact that the agreement reserved from its operation claims for carrying the mail, and for other services rendered not pertaining to or based upon Federal control, clearly demonstrates that the parties intended to adjust the claims growing out of Federal control, and since the Federal control of appellant's railroad is not claimed to have extended beyond July 1, 1918, it must follow that it was the clear intention of both parties that the claims now asserted should be adjusted, satisfied, and discharged in consideration of the two day's free time or reclaim allowance. If such claims were not included in the settlement, we inquire what did the Director General receive as consideration for continuing the two days' free time or reclaim allowance on cars. No other consideration is suggested by appellant, and the allegations of the amended petition clearly indicate there could be no other consideration. Unless the claims now asserted were claims satisfied and discharged by such agreement the Director General and the United States received a "gold brick" from the appellant in consideration of the very substantial benefits the Director General accorded to the appellant in continuing the two days' free time or reclaim allowance. Agreements of this character entered into by the Government are not to be lightly cast aside, or the benefits bargained for by the Government lightly frittered away by unwarranted interpretation or construction.

In the case of *United States* v. *William Cramp & Sons Company*, 206, U. S. 113–128, a receipt given for the final payment on contract price for constructing a war vessel recited that in consideration of the payment of $41,132.86, balance of a special reserve of $60,000.00, the William Cramp & Sons Company

> does hereby for itself and its successors and assigns and its legal representatives recognize, release, and forever discharge the United States of and from all, and all manner of debts, dues, sum, and sums of money, accounts, requirements, claims, and defenses whatsoever in law or in equity for or by reason of, or on account of the construction of said vessel under the contract aforesaid.

It was claimed by the company that this release did not cover claims for damages on account of delays or other matters attributable to the United States in connection with the work of constructing the vessel. In upholding the release as covering all such matters, although the question of damages was not considered in connection with its execution, the court said:

> Indeed the general language of the release itself and the number of words of description in it showed that it was the intention of the Secretary of the Navy to have a final closing of all matters arising under, or by virtue of the contract. *Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical and close construction.* The general language, all and all man-

> ner of debts, * * * indicates a purpose to make an ending of whatever matter arising under or by virtue of the contract. If parties intended to leave such things open and unsettled, their intent so to do *should be made manifest.* Here was a contract involving three millions of dollars, and after the war was done, the vessel delivered and accepted, and this release entered, claims are presented amounting to over $500,000.00. Surely the parties never intended to leave such a bulk of unsettled matters.

Paraphrasing the language of the court we say it was clearly the intent of the Director General to have a final closing of all matters arising out of the Federal control of appellant's railroad, for in the agreement suggested, in consideration of free time, it was expressly recited that in consideration of such special advantages and other anticipated benefits appellant

> agrees to accept the same in full adjustment, settlement, satisfaction and discharge of any and all claims and rights at law or in equity which it now has, or hereinafter can have against the United States * * * by virtue of anything done or omitted pursuant to the acts of Congress relating to the Federal control of railroads.

In view of such language, if appellant sought to reserve or leave open the claims now asserted, its "intent so to do should be made manifest." Appellant sought to leave open, and did leave open,

its claim for mail pay and for services rendered "not pertaining to or based upon the Federal Control Act." Instead of manifesting its intention that these claims should be held open, the language used clearly shows the claims were the very ones intended to be settled, the very matters the Director General intended "to have a final closing of," the very consideration for which he agreed to continue the two days' free time allowance on cars.

To permit appellant to now say these claims were not included would be to permit the violation of the elementary rule that the plain language of a written instrument cannot be varied or contradicted on the theory that a party thereto did not intend the clear and certain meaning thereof. We conclude the claims are covered, satisfied and discharged by the agreement, and that the demurrer was rightly sustained on such ground unless the agreement is vulnerable to some other objection urged by the appellant to be hereafter considered.

B

Appellant's claim of coercion

In paragraph 4 of the amended petition (Record, Page 3) appellant alleges that:

> The Director General by virtue of his power and influence over the business of plaintiff operating in connection with lines of railroad then in his operation, and control, advised and in effect forced and com-

> pelled this plaintiff to accept and sign a contract then known as a per diem contract for short-line railroads, under date of September 10, 1919. A full, true, and correct copy of such contract is hereto attached, marked Exhibit A, and made a part hereof.

Such language is a mere conclusion, does not state any facts upon which coercion could be found, and there is presented nothing which would permit a Court of Equity having jurisdiction to set aside the contract on the grounds of coercion. Such relief is not even asked and probably could not be granted by the Court of Claims in any event. The claim is abandoned in this Court. On the question of coercion, however, we call attention to the language of the agreement which recites:

> Whereas the said Railroad Company has elected not to enter into the standard, cooperation, short-line contract with the Director General of Railroads, but is desirous of obtaining the special advantages of two days' free time or reclaim allowance on cars and such other cooperation as may be accorded to it by the Director General in pursuance of his policy of cooperation toward short-line roads as announced by him.

This language clearly shows appellant was acting freely and elected to enter into this agreement instead of an agreement, which, so far as this record discloses, may have furnished many additional advantages, but it probably would not have been advantageous to the appellant of account of its pecul-

iar situation. If there was coercion, same was withstood by appellant for more than 14 months after its property was relinquished and the allegations of the amended petition justify the conclusion that the coercion was not of a character to justify interference of a Court of Equity. It may be the Director General declined to enter into a contract more advantageous to the appellant, but that fact does not constitute coercion that will void a contract freely entered into. We conclude the agreement is not to be set aside in this proceeding on the ground of coercion.

C

The agreement is not unilateral or invalid because not signed by the Director General

The agreement in question is not unilateral within the meaning of that term, but involves mutual promises and considerations. Appellant desired to obtain the " special advantages of 2 days' free time or reclaim allowance on cars " and to secure such " special advantages " executed an agreement which recites in substance that in consideration of obtaining the advantages of 2 days' free time or reclaim allowance and such other cooperation as the Director General might accord, the appellant " hereby agrees to accept the same in full adjustment, settlement, satisfaction and discharge of any and all claims and rights in law or in equity which it now has or hereafter can have against the United States, etc.," by virtue of anything done or

omitted pursuant to the acts of the Congress relating to Federal control of railroads.

The consideration moving from the Director General to the appellant was two days' free time or reclaim allowance on cars and such other cooperation as the Director General might accord the appellant, and the consideration moving from the appellant to the Director General was the adjustment, settlement, satisfaction and discharge of all claims and rights of the appellant against the Government on account of the Federal control and operation of its property during the first six months of 1918. There is no contention that appellant did not receive the 2 days' free time allowance in accordance with the contract, or that it did not in fact receive the consideration named therein. There is no rule of law more familiar than that a contract need not necessarily be in writing and signed by both parties. Unless within the statute of frauds a contract may be entirely oral, or it may be in part in writing and in part oral. It may be in the form of a written offer and an oral or implied acceptance, or an oral offer and acceptance in writing or by the acts of the party. A familiar illustration is a deed coveying land which provides that the grantee assumes and agrees to pay a certain indebtedness constituting an incumbrance on the land as a part of the purchase price. The deed is not signed by the grantee but the courts universally hold the grantee by accepting the deed becomes legally liable to the creditor. By accepting the

deed with such provision he enters into a contract to pay the indebtedness. The doctrine involved is elementary and we refrain from citation of authorities.

The agreement has been executed on the part of the Director General by continuing the free time allowance. Such free time allowance was granted in reliance upon the agreement. The agreement was executed on the part of the appellant at the time of its execution and delivery to the Director General, for the release and discharge was operative at once. In consideration of a present release and discharge of certain claims and rights appellant could assert against the Government, the Director General agreed to continue the free time allowance and thereafter fully performed his agreement. There was, therefore, no lack of mutuality.

The following cases support such conclusion:

Storm v. *United States,* 95 U. S. 76.
Mississippi River Logging Company v. *Robson,* 69 Fed. 775, C. C. 88 Circuit.
White & Wilson Manufacturing Company v. *Lyon,* 71 Fed. 374.
Mississippi Glass Company v. *Franson,* 143 Fed. 501–507.

In the latter case the Court, quoting from an opinion of the Supreme Court of Pennsylvania, said:

> Want of mutuality is no defense to either party except in cases of executory contracts.

> It has no applicability to an executed bargain. There are many where the obligation is all upon one party. As to one the obligation was fulfilled, the contract was executed when it was made; as to the other party it remained executory. A consideration may be either something done or something to be done or a promise itself. When it is something already done it is idle to talk of want of mutuality. That is to be considered when the obligations of both parties are future.

We conclude, the agreement is not to be held inoperative because of want of mutuality or on the theory of being unilateral. The appellant has received the full consideration for which it bargained, and unless the agreement is bad for some other reason, must be enforced in behalf of the Government.

D

The consideration of the contract

The appellant alleges in paragraph 4 of the amended petition that the agreement was without consideration and that appellant gained nothing by the execution and acceptance of the agreement; that no consideration was created therein or intended to be created for the use and benefit of the appellant. In said paragraph, however, appellant states that the agreement "was accepted by the officers of the plaintiff for the purpose of saving for themselves such rights, privileges, and conven-

iences as were indicated by the Director General and was signed for this purpose only and not otherwise, and for the supposed concessions set out in the contract itself." This latter statement shows not only that appellant acted freely in entering into the agreement, but that it expected a benefit from the concession of the Director General. This benefit it has received. The main benefit was two days' free time in the use of the Director General's cars, while on its line of railroad. The fact that appellant was receiving such concession prior to the execution of the agreement does not make the concession any the less a consideration.

The appellant was bargaining for a continuance of a concession it already had, but which the Director General was not bound to continue. He could withdraw such concession and it is apparent from the language quoted from paragraph 4 of the amended petition that he was proposing to withdraw such concession unless the agreement should be executed and that appellant executed the agreement "for the purpose of saving for themselves such rights, privileges, and conveniences as were indicated by the Director General." In that sense the Director General may have been guilty of duress, but same did not constitute legal duress, as the Director General was not obligated to continue the concession, and in agreeing to continue the concession he had a right to demand a consideration from the appellant. The consideration demanded was the satisfaction and discharge of all claims

appellant might otherwise make on account of the Federal control and operation of its property. Whether the consideration was adequate will not be inquired into by this Court in view of the capacity of both parties to the contract. Whether the concession of two days' free time was fully adequate consideration might furnish just occasion for difference of opinion before the agreement was entered into. The value of such consideration would, of course, depend on how long the concession was to continue. When the agreement was made the time Federal control would continue was uncertain. If same should continue a period of years, as was possible, the consideration would be of greater value than it was in view of the fact that Federal control terminated March 1, 1920, nearly six months after the agreement was entered into. The appellant had the benefit of the consideration for nearly six months and the Court will, under the circumstances presented, not inquire into whether it made a good or a bad bargain. It is not seeking to set aside the agreement or to void it on the ground of inadequacy of consideration, but rather it alleges there was *no* consideration. The allegations of the amended petition show a consideration and the statements therein that there was no consideration constitute a mere conclusion which is overcome by the language of the agreement.

There was, therefore, a sufficient consideration shown in the amended petition for the execution of

the agreement and same cannot be avoided on the theory of lack of consideration.

E

The power of the Director General to make the agreement

In Section 10 of appellant's brief contention is made that the agreement is void on its face because the Director General had no power to make it, appellant bases such contention on the fact that its railroad has been relinquished, and in relinquishing same the Director General exhausted all of his rights and powers in reference to it. It will be recalled that Section 8, of the Federal Control Act provides that the President may execute any of the powers granted with relation to Federal control through such agencies as he may determine. The court takes jurisdictional notice of the proclamations of the President, and it will be recalled that the President by proclamation vested in the Director General all powers granted to him by the Federal Control Act, except the appointment of the Director General. If the President had power to make such a contract as that here involved, then the Director General had power to do so. That the Director General had power to make traffic or other appropriate agreements for handling traffic, cars, and the like, as between Federal and non-Federal lines must be conceded, as a matter of necessity. The agreement in question involves interchange of cars between the Director General and the appel-

lant and provides for two day's free time. If the property of appellant was under Federal control, Section 1, of the Federal Control Act authorized the President to agree with appellant as to its compensation for the use of its property, and fixed a maximum allowance, leaving the President to agree to make compensation for any amount, less than such maximum, he should think proper. In such contract he was authorized to make provision for maintenance, depreciation, retirements, and the like. There is nothing in the statute prohibiting the President from making compensation in something other than money, provided the appellant was willing to agree thereto. There was nothing in the statute prohibiting appellant from waiving compensation, and if its waiver was based on a good consideration, whether adequate or not, it would be bound thereby. This agreement is, we think, either an agreement for compensation measured by two day's free time on cars during the remainder of Federal control period, however long, or it was an agreement pursuant to which the appellant for a sufficient consideration waived compensation. Congress recognized the existence of such contracts in enacting the Transportation Act, 1920. In Section 203 of that act it is provided:

> Section 203. (a) Upon the request of any carrier entitled to just compensation under the Federal Control Act, but with which no contract fixing *or waiving compensation* has been made, and which has made *no waiver*

> *of compensation*, the President (1) shall pay to it as much of the amount he may determine to be just compensation as may be necessary to enable such carrier to have the sums required for interest, taxes, et cetera.

The thought we suggest is that Congress in authorizing the President to complete settlements with carriers under Federal control recognized that certain carriers had already made contacts for compensation, that certain other carriers had made contracts waiving compensation, and certain other carriers had made "waiver of compensation." Such carriers were excluded from the authority granted the President in Section 203. Such recognition shows Congress believed the President had authority to make contracts of this character. We think there can be no question but that the President had the power to make the contract. The same was made fairly. In such contract the appellant for a sufficient consideration acknowledged satisfaction and discharge of all claims now asserted. Appellant has received the consideration for which it bargained and must now abide by the terms of the agreement, and is precluded from any recovery in this suit.

In conclusion we say the agreement made a part of the amended petition as Exhibit A is a valid and binding agreement as between the parties and that same evidences a complete and final settlement, satisfaction and discharge of all claims of

appellant in this suit, and that appellant has received the consideration from the Director General therein bargained for, which consideration is adequate and such agreement concludes the appellant in respect to the claims presented, as well as any other claims it might have otherwise asserted. Appellant has retained the benefits of said agreement and cannot now be heard to assert it is not bound thereby. The demurrer was, in our judgment, properly sustained and we respectfully ask the judgment of the Court of Claims be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

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